UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILLIAM B. GREENE, Petitioner, v. JEFFREY UTTECHT, Respondent.	CASE NO. C08-0040-RSL REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner William Greene is currently incarcerated at the Washington State Penitentiary in Walla Walla pursuant to a judgment and sentence of the Snohomish County Superior Court. He has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 seeking relief from his current confinement. Respondent has filed an answer to the petition together with relevant portions of the state court record, and petitioner has filed a response to respondent's answer. The briefing is now complete and this matter is ripe for review. The Court, having reviewed the briefing of the parties, and the balance of the record, concludes that petitioner's federal habeas petition should be denied and this action should be dismissed with prejudice.

FACTUAL AND PROCEDURAL HISTORY

Petitioner, by way of the instant habeas petition, seeks to challenge his 2003 conviction in Snohomish County Superior Court on charges of first degree kidnapping and indecent liberties. Petitioner was originally convicted of these charges in 1995 and was sentenced to life imprisonment without the possibility of parole as a "persistent offender" pursuant to RCW 9.94A.120(4). (*See* Dkt. No. 15, Ex. 2 at 152-153.) However, petitioner's original convictions were overturned on federal habeas review. *See Greene v. Lambert*, C00-938-MJP; *Greene v. Lambert*, 288 F.3d 1081 (9th Cir. 2001).

Petitioner was re-tried on the kidnapping and indecent liberty charges, and was once again convicted and sentenced to life imprisonment without the possibility of parole as a "persistent offender" pursuant to RCW 9.94A.120(4). (*See* Dkt. No. 15, Ex. 1.) Petitioner once again appealed his convictions to the Washington Court of Appeals.

The Court of Appeals summarized the facts of petitioner's offenses, and the relevant procedural history and trial proceedings as follows:

> After William Bergen (Bill) Greene's 1988 conviction for indecent liberties, he participated in a sexual offender treatment program at the Twin Rivers Corrections Center (Twin Rivers). One of Greene's therapists was M.S., a psychiatric nurse. During the course of therapy, M.S. came to believe that Greene had Dissociative Identity Disorder (DID). M.S. persuaded Twin Rivers treatment providers that Greene should be evaluated for DID.
>
> In 1991, after some testing, Greene was diagnosed as "rule out" DID, meaning that Greene met some, but not all, of the criteria for a DID diagnosis. The Twin Rivers treatment providers decided that although the diagnosis was not definitive, Greene should be treated as if he had DID.
>
> An individual suffering from DID has a non-integrative identity divided between the primary identity (host) and at least one alternative identity or identity fragment (the alter(s)). This lack of integration results in debilitating ruptures in the

patient's personality, behavior, thought, and memory. DID is a pathologically repressed coping mechanism that allows a traumatized individual to "find lifesaving retreat in an altered phenomenal state, in much the way that a hypnotized person is able–not to escape pain–but to disassociate from the experience of pain."

The heterogeneity of alters (e.g., gender, age, race, sexual orientation, etc.) and their modes of coexisting with the host (e.g., co-conscious, amnestic, amnestic with "leakage") is extremely varied and defies easy categorization. Childlike alters are the most frequently seen type of alters. Members of the psychiatric field debate whether DID can be induced by hypnosis or suggestion or can be misdiagnosed due to either feigning symptoms or malingering.

Greene's treatment in the sexual offender program at Twin Rivers included extensive therapy with M.S. and hypnosis. According to M.S., Greene manifested more than 20 different identities during therapy. After Greene's November 1992 release from Twin Rivers, M.S. continued therapy with him in the community.

In spring 1994, after Greene lost his job and his girlfriend ended their relationship, Greene's mental state appeared to deteriorate. On Monday April 25, Greene told M.S. he wanted to temporarily stop therapy. M.S. agreed, on the condition that he calls her office everyday. When Greene called M.S. on Friday, he sounded "very distraught." Concerned that Greene might be suicidal and need to be hospitalized for psychiatric observation, M.S. decided to visit him.

M.S. arrived at Green's apartment at about 3:00 p.m. Greene appeared disheveled and his apartment was uncharacteristically untidy. After several minutes, M.S. realized that Greene had been using drugs. M.S. testified that at first Bill denied using drugs, but then one of the alters, "Tyrone," emerged and admitted he had been using drugs. When M.S. got up to leave, Greene blocked her way and told her to take off her shirt. M.S. tried to spray Greene with the pepper spray attached to her key chain, but as she did so he pushed her hand down. While trying to back away, M.S. fell backwards on the floor. Greene then grabbed her shirt and tore it off as she fell. Greene sat on M.S., straddling her legs. Greene took off M.S.'s bra and began touching and sucking her breast. Periodically, Greene would stop and ingest cocaine at the bathroom sink. Then, he would return and resume the assault on M.S. At some point while M.S. was crying, she put her hands on her face and the pepper spray got in her eyes. At that point, M.S. testified that a "protector-alter," Sam, emerged and helped her wash her eyes and hands. During the assault, Greene also pulled his pants down and touched the end of his penis.

Eventually Greene let M.S. get up and said she could go and gave her a sweatshirt to wear. But then Greene changed his mind and told her he could not let her leave. Greene took M.S. into the bedroom, tied her hands and feet with a cord,

and put duct tape over her mouth. He then took M.S.'s keys and drove away in her car.

About twenty minutes after Greene left, at approximately 6:00 p.m., M.S. freed herself and walked to a nearby hospital. At approximately 11:30 p.m. that night, Greene was arrested in Everett driving M.S.'s car.

Greene was charged with first-degree kidnapping and indecent liberties of M.S. In an interview with his expert witness, Dr. Craig LeReau, in preparation for trial, Greene said that several alters were present during the assault of M.S. Greene told Dr. LeReau that when the alters decided to commit suicide, he tied up M.S. so she wouldn't be able to stop him.

Before Greene's first trial, the court held a hearing on the admissibility of DID evidence under Frye [v. United States, 293 F. 1013 (D.C. Cir. 1923)] and ER 702. The court ruled that DID did not satisfy the Frye standard of general acceptance within the scientific community, and the testimony was not helpful under ER 702. The court excluded the DID testimony, including M.S.'s description of Greene's mental state, her description of the alters during the assault, and Greene's testimony about his mental state during the assault. The jury convicted Greene as charged. Based on Greene's prior convictions, the court sentenced him to life imprisonment as a persistent offender under the POAA.

In Green's first appeal, this court ruled as a matter of law that DID meets the Frye standard and the trial court abused its discretion in excluding DID evidence under ER 702, reversing Greene's conviction and remanding for a new trial. State v. Greene, 92 Wn. App. 80, 960 P.2d 980 (1998). In the opinion, we discuss various approaches to assess insanity based on DID, but given the lack of medical and scientific consensus, this court declined to adopt a particular approach and instead concluded a case-by-case approach was appropriate. Greene, 92 Wn. App. at 101-02.

The Washington Supreme Court reversed and affirmed Greene's conviction. The Supreme Court agreed the DID evidence satisfied the Frye standard, but disagreed with this court's conclusion that the trial court abused its discretion in excluding the DID evidence under ER 702. Relying onState v. Wheaton, 121 Wn.2d 347, 850 P.2d 507 (1993), and the testimony in the record, the Court held that the evidence about DID was properly excluded because it was incapable of forensic application and did not assist the trier of fact in determining legal culpability under ER 702. State v. Greene, 139 Wn.2d 64, 74-75, 984 P.2d 1024 91999), cert. denied, 529 U.S. 1090 (2000). The Court concluded that the record provided no basis to decide how DID relates to a determination of legal culpability and that "none of the various approaches have been accepted as producing results capable of reliably helping to resolve questions regarding sanity and/or mental capacity in a legal sense." Greene,

139 Wn.2d at 77.

In affirming the U.S. District Court's decision to grant Greene's petition for habeas corpus, the Ninth Circuit concluded that by preventing M.S. from testifying about her observations concerning DID during the assault and by preventing Greene from testifying about DID and his state of mind during the assault, the Washington Supreme Court decision infringed on Greene's constitutional right to present an insanity defense. Greene v. Lambert, 288 F.3d 1081, 1091 (9th Cir. 2002). While the Ninth Circuit did not disturb the Washington Supreme Court's ER 702 analysis and its conclusion that the expert testimony was not helpful to the trier of fact, the Court recognized that "requiring the state court to permit DID evidence from the victim and the Petitioner may have the consequence of requiring expert testimony to provide context for the finder of fact." Greene, 288 F.3d at 1093.

Greene's second trial took place in 2003. The defense theory was that because of DID, Greene was insane at the time of the assault and was not able to form the requisite intent to commit the charged crimes. During the five-week trial, both parties presented extensive testimony regarding DID. Greene presented the expert testimony of Dr. LeReau and Dr. Marlene Steinberg. The two experts expressed the opinion that Greene has DID and is not feigning symptoms or malingering. M.S. testified about her observations and her opinion that an alter was in control of Greene's actions during the assault. Greene did not testify.

The State vigorously contested Greene's DID diagnosis. The State's three expert witnesses each testified that Greene most likely did not have DID. One of the State's experts, Dr. Robert Olsen, had previously testified on Greene's behalf in the first trial. Dr. Olsen was originally designated as an expert witness by Greene in the second trial. But after evaluating Greene again, Dr. Olsen concluded Greene had "fooled [him]" and agreed to testify on behalf of the State at his own expense.

The State also presented the testimony of several lay witnesses who had spent time with Greene. The lay witnesses each testified that Greene manifested no symptoms that were consistent with DID before he learned about DID from M.S. The State also presented the testimony of two prior victims of factually similar sexual assaults. The victims described the sexual assaults and testified that in neither instance did Green manifest any symptoms consistent with DID.

The defense initially proposed using the standard WPIC insanity defense jury instruction, WPIC 20.01. But after the State submitted supplemental jury instructions for DID, the defense also submitted supplemental instructions. The supplemental instructions proposed different approaches for assessing insanity based on DID. The court declined to use the supplemental instructions. Instead, the court used the standard WPIC instruction to instruct the jury on Greene's insanity defense. Based

> on the testimony concerning Greene's use of cocaine during the assault, the court also gave a voluntary intoxication instruction. The jury convicted Greene as charged. The court sentenced Greene to life in prison under the POAA.

(Dkt. No. 15, Ex. 7 at 2-8 (footnotes omitted).)

On November 20, 2006, the Washington Court of Appeals affirmed petitioner's conviction and sentence in an unpublished opinion. (*Id.*, Ex. 7.) Petitioner filed a motion for reconsideration in the Court of Appeals, but that motion was denied on December 22, 2006. (*Id.*, Exs. 8 and 9.) Petitioner next filed a petition for review in the Washington Supreme Court. (*Id.*, Ex. 10.) The Supreme Court denied review without comment on December 4, 2007. (*Id.*, Ex. 12.

GROUNDS FOR RELIEF

Petitioner asserts the following grounds for relief in his federal habeas petition:

GROUND ONE: The state trial court violated my federal constitutional right to due process and trial by jury; by refusing to provide proper jury instructions.

GROUND TWO: The state trial court violated my federal constitutional rights to due process and trial by jury; by issuing confusing and conflicting jury instructions.

GROUND THREE: Impermissibly restricted petitioner's federal constitutional right to present a defense of his own choosing and improperly admitted uncharged criminal conduct in its state's case-in-chief.

GROUND FOUR: Denied right to trial by jury when imposing sentence over maximum statutory term based on prior convictions.

(*See* Dkt. No. 5 at 5, 6, 8, and 10.)

DISCUSSION

Standard of Review

Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), a habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if

the state court's decision was *contrary to*, or involved an *unreasonable application* of, clearly established federal law, as determined by the Supreme Court, or if the decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d) (emphasis added).

Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Id*. The Supreme Court has made clear that a state court's decision may be overturned only if the application is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 69 (2003).

Clearly established federal law, for purposes of AEDPA, means "the governing legal principle or principles set forth by the Supreme Court at the time the state court render[ed] its decision." *Id*. at 71-72. "If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law." *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004) (citing *Dows v. Wood*, 211 F.3d 480, 485-86 (9th Cir. 2000)).

/ / /

/ / /

Grounds One and Two: Jury Instructions

A writ of habeas corpus may issue only upon a finding that a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). It is not the province of federal habeas courts to re-examine state court conclusions regarding matters of state law. *Estelle v. McGuire*, 502 U.S. 62 (1991); *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir. 1993), *cert. denied*, 510 U.S. 1191 (1994). Accordingly, the fact that a jury instruction is incorrect under state law is not a basis for habeas relief. *Estelle v. McGuire*, 502 U.S. at 67-68.

The question that the federal habeas court must address when reviewing claims of instructional error in a state court trial is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Before a federal habeas court can overturn a state court conviction in which an allegedly erroneous instruction was given, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp*, 414 U.S. at 146.

The Supreme Court has made clear that a challenged instruction "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record. *Estelle*, 502 U.S. at 72 (citing *Cupp*, 414 U.S. at 147.) The Supreme Court has also made clear that when reviewing an ambiguous jury instruction the proper inquiry is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle*, 502 U.S. at 72 (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)).

1. Insanity Instruction

Petitioner asserts in his first ground for federal habeas relief that the trial court erred when it refused requests by both the prosecution and the defense to supplement the standard WPIC insanity instruction, WPIC 20.01, with more specific language advising the jury how to assess a claim of insanity predicated on DID.

The standard WPIC insanity instruction, WPIC 20.01, provides as follows:

> For a defendant to be found not guilty by reason of insanity you must find that, as a result of mental disease or defect, the defendant's mind was affected to such an extent that the defendant was unable to perceive the nature and quality of the acts with which the defendant is charged or was unable to tell right from wrong with reference to the particular acts with which the defendant is charged.

The state requested that the trial court supplement this standard instruction with instructions describing either a "specific alter" or a "unified approach." As explained by the Court of Appeals:

> The "specific alter" approach instructs the jury to focus on the capacity of the alter personality who was in "executive control" of Greene's body at the time of the crime. The "unified approach" instructs the jury to assess Greene's mental capacity as a whole and ignore the boundaries between specific personalities or alters.

(Dkt. No. 15, Ex. 7 at 9.)

The defense then requested that the court supplemental the standard instruction with instructions describing either a "host personality" or a "specific alter" approach. As explained by the Court of Appeals, "[t]he 'host approach' (also called a "global" approach) tells the jury to assess whether 'the defendant's host personality' was unable to perceive the nature and quality or the wrongfulness of the acts charged." (*Id*., Ex. 7 at 10.)

The trial court, in rejecting the proposed supplemental instructions, noted its concern that

giving those instructions would constitute a comment on the evidence which would be inappropriate. (*Id*., Ex. 33 at 2913-14.) The trial court then concluded that the WPIC insanity instruction was a correct statement of the law and that "both sides can adequately argue the theories of their case from this instruction." (*Id*., Ex. 33 at 2915.)

On direct appeal, the Washington Court of Appeals reviewed the expert testimony presented at petitioner's second trial in light of the Washington Supreme Court's prior decisions in *State v. Wheaton*, 121 Wn.2d 347 (1993), and *State v. Greene*, 139 Wn.2d 64 (1999), two of the cases upon which petitioner relies heavily in his arguments to this Court, and concluded that the trial court did not err in refusing to adopt a legal standard and instruct the jury on how to assess petitioner's insanity defense based on DID.

As the Court of Appeals explained:

> [T]he Court concluded in both Wheaton and Greene that adoption of a legal standard must be "soundly based" on a record that clearly supports one of the competing approaches for assessing insanity based on DID. Wheaton, 121 Wn.2d at 356. Here, therefore, we must determine whether, as a matter of law, the record in Greene's second trial provided a sound basis to adopt a particular approach to instruct the jury on how to assess insanity predicated on DID.
>
> . . . .
>
> The concerns raised by the Court in Wheaton and Greene regarding the absence of a scientific basis to establish a legal standard to assess the mental state of a defendant with DID were not resolved by the testimony in this case. We conclude the court's decision declining to adopt a DID-specific legal standard and instead instruct the jury using the WPIC insanity defense instruction was not error.

(Dkt. No. 15, Ex. 7 at 15.)

While petitioner alleges that the trial court's failure to provide more specific direction to the jury for assessing his insanity claim in light of DID implicates federal constitutional concerns,

the crux of his argument appears to be that state law required that such an instruction be given and that the Court of Appeals erred in concluding otherwise. As noted above, it is not the province of federal habeas courts to re-examine state court conclusions regarding matters of state law, *Estelle*, 502 U.S. at 68. The Washington Court of Appeals concluded that, under state law, petitioner was not entitled to a DID-specific jury instruction. Petitioner's claim that he was denied his right to such an instruction is therefore not cognizable in these proceedings.

Even assuming petitioner's claim can properly be construed as one implicating federal constitutional concerns, petitioner identifies no United States Supreme Court authority which supports the proposition that the failure of the trial court to give a DID specific insanity instruction deprived petitioner of his federal constitutional rights. Petitioner suggests in his briefing that the trial court's refusal to supplement the standard insanity instruction as requested relieved the state of its burden of proving each element of the charged offense beyond a reasonable doubt. Jury instructions which relieve the prosecution of this burden violate a defendants due process rights. *Carella v. California* , 491 U.S. 263, 265 (1989). However, the record does not support the conclusion that the jury instructions, as given, relieved the prosecution of this burden.

Petitioner also suggests that the instructions, as given, deprived him of his right to present a defense. The United States Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Crane v. Kentucky* , 476 U.S. 683, 690 (1986)(quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). The record reveals that petitioner was provided such an opportunity. The refusal of the trial court to give the requested supplemental instructions did not interfere with petitioner's ability to present the evidence necessary to support his insanity defense nor did it preclude the parties from arguing their

respective theories of the case.

The decision of the Washington Court of Appeals with respect to petitioner's first jury instruction claim was neither contrary to, nor did it constitute an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Accordingly, petitioner's federal habeas petition should be denied with respect to his first ground for relief.

2. Voluntary Act Instruction

Petitioner asserts in his second ground for federal habeas relief that the trial court erred when it gave a "voluntary act" instruction because the "voluntary act" instruction confused the legal standard for insanity and conflicted with the diminished capacity and voluntary intoxication instructions given by the court.

The instruction at issue, WPIC 20.04, provides that "[n]o condition of mind directly induced by the voluntary act of a person charged with a crime constitutes insanity." (Dkt. No. 15, Ex. 2 at 79 (Instruction 25).) Petitioner's counsel objected to the giving of this instruction on the grounds that there was no evidence that drug use caused petitioner's insanity and that his insanity defense was predicated solely on DID. (*See* Dkt. No. 15, Ex. 33 at 2917.) The trial court deemed the instruction appropriate because there was evidence presented at trial that petitioner had ingested cocaine during the course of the assault of M.S. and there was evidence about the effect of the cocaine on petitioner's state of mind. (*See id.*, Ex. 33 at 2917.)

On direct appeal, the Court of Appeals rejected each of petitioner's several arguments in support of his claim that the trial court erred in giving the voluntary act instruction. The court explained its conclusions as follows:

Below, Greene argued there was no evidence that drug use caused his insanity and his insanity defense was based solely on DID. But, based on the evidence at trial, the court decided the jury could conclude Greene was insane because of the effect the cocaine had on his DID disorder. Dr. LeReau testified that if Greene was not under the influence of drugs, "he may have been able to avoid the abreaction, but because of the loosening of boundaries, because of the cocaine intoxication, he wasn't able to stop his disorder from manifesting in the way this manifested that day." M.S. also testified that Greene's use of cocaine caused an inability to control "his system." We conclude the evidence supports the trial court's decision to give the voluntary act instruction.

Greene also contends the instruction was inappropriate because of an exception to the rule that a condition of mind induced by voluntary intoxication can constitute insanity. Under limited circumstances, when the influence of intoxicants "triggers an underlying psychotic disorder of a settled nature, such as a delirium tremens," the instruction is inappropriate. Wicks, 98 Wn.2d at 623. In Wicks the exception applied because the defendant was diagnosed with undifferentiated schizophrenia whose psychosis was caused by the voluntary ingestion of alcohol and drugs. Here, unlike in Wicks, there was no testimony that Greene's use of cocaine caused DID. But Wicks does not hold that a voluntary intoxication instruction is inappropriate where the use of alcohol or drugs exacerbates an underlying disorder. Wicks, 98 Wn.2d at 625.

Greene also relies on the "Note on Use" for WPIC 20.04 to argue the instruction was inappropriate because it was not intended for use in cases where a diminished capacity defense is asserted. The Note on Use for WPIC 20.04 states that the instruction should not be used "if the defendant pleads voluntary intoxication or diminished capacity instead of insanity." But the Note does not address the use of the instruction where both insanity and diminished capacity are asserted. We conclude where the defendant, as here, asserts both defenses, it is not error to give the instruction.

Although voluntary intoxication applies differently to insanity and diminished capacity, the WPIC jury instructions for the two defenses do not create a conflict. For Greene's diminished capacity defense, the court correctly instructed the jury that it could consider evidence of voluntary intoxication in deciding whether Greene acted with intent or knowledge. For Greene's insanity defense, the court instructed the jury that evidence of a mental illness or disorder may be considered in deciding whether Greene had the capacity to form the requisite intent or knowledge. Based on the evidence presented, the court also correctly instructed the jury that no "condition of mind directly induced" by drugs or alcohol constitutes insanity.

The voluntary act instruction for insanity is an accurate statement of the law

> and was supported by the evidence. Here, the voluntary act instruction for insanity did not conflict with the diminished capacity instruction and the court did not err in giving the instruction.

(Dkt. No. 15, Ex. 7 at 16-19 (footnotes omitted).)

The Court of Appeals' conclusion that the voluntary act instruction was an accurate statement of state law, and was appropriately given in light of the evidence presented at petitioner's trial, may not be re-examined by this Court on federal habeas review. *See Estelle*, 502 U.S. at 68. Petitioner's suggestion that the instructions, as given, were confusing to the jury and therefore undermined his right to a fair trial is not borne out by the record.

The decision of the Washington Court of Appeals with respect to petitioner's second jury instruction claim was neither contrary to, nor did it constitute an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Accordingly, petitioner's federal habeas petition should be denied with respect to his second ground for relief.

Ground Three: Admissibility of Evidence

Petitioner asserts in his third ground for federal habeas relief that the trial court improperly admitted evidence of uncharged criminal conduct in the state's case-in-chief, thereby restricting petitioner's right to present the defense of his own choosing. At issue here is evidence regarding two prior sexual assaults committed by petitioner. Prior to trial, defense counsel stipulated that the evidence was admissible. (*See* Dkt. No. 15, Ex. 15 at 53-54.) However, when the state called the victim of one of the prior sexual assaults, B.B., as its first witness, defense counsel objected. (*See id.*, Ex. 15 at 51-53.)

Defense counsel agreed that the testimony was admissible to establish petitioner's knowledge and intent, but argued that it was unfairly prejudicial to permit this witness to testify

prior to the defense putting on any evidence of insanity. (*Id.*, Ex. 15 at 65.) The defense position was that the evidence was admissible only in the state's rebuttal case. The trial court disagreed with the defense argument, ruling that the evidence of the prior sexual assaults was admissible under Washington Evidence Rule 404(b) for the purpose of establishing knowledge and intent, both of which were elements of the charged offenses which the state had the burden of proving beyond a reasonable doubt.[1] (*Id.*, Ex. 15 at 66.)

The Washington Court of Appeals, on direct review, rejected petitioner's contention that the trial court abused its discretion by prematurely admitting ER 404(b) rebuttal evidence and unfairly dictating the defense strategy. The Court of Appeals noted that the trial court admitted the evidence of the prior sexual assaults as evidence of intent and knowledge under ER 404(b) and not as rebuttal evidence. (*Id.*, Ex. 7 at 20.) The Court of Appeals concluded that the trial court applied the proper standard in evaluating the admissibility of the evidence and did not abuse its discretion in admitting the evidence of the prior assaults during the state's case-in-chief. (Dkt. No. 15, Ex. 7 at 19-21.)

Federal habeas review of state court evidentiary rulings is strictly circumscribed. *See Marshall v. Lonberger*, 459 U.S. 422, 438 (1983). As noted above, "it is not the province of a federal habeas court to reexamine state court determinations on state law questions." *Estelle*, 502 U.S. at 68. Only if an evidentiary ruling rises to the level of a constitutional violation is it

---

[1] Washington Evidence Rule 404(b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

cognizable on habeas review. *See id.* at 67-68.

The trial court's ruling that the evidence of petitioner's prior crimes was admissible during the state's case-in-chief does not implicate federal constitutional concerns. Petitioner cites to no clearly established federal law which would have required the prosecution to defer presentation of the evidence until its rebuttal case where, as here, the evidence was admissible under state law to establish elements of the charged offenses. Accordingly, the decision of the Washington Court of Appeals rejecting petitioner's challenge to the evidentiary ruling of the trial court was neither contrary to, nor did it constitute an unreasonable application of, federal law as established by the United States Supreme Court. Petitioner's federal habeas petition should therefore be denied with respect to his third ground for relief.

Ground Four: Constitutionality of Sentence

Petitioner asserts in his final ground for federal habeas relief that his federal constitutional rights were violated when the trial court imposed a sentence over the maximum statutory term based upon facts which were not found by a jury beyond a reasonable doubt.

Petitioner was sentenced to a term of life imprisonment without the possibility of parole under Washington's Persistent Offender Accountability Act ("POAA"). The POAA mandates that such a sentence be imposed when an offender who is convicted of any felony considered a "most serious offense" has two or more prior convictions of felonies that would be considered "most serious offenses" under the laws of the State of Washington. *See* RCW 9.94A.030(32) and RCW 9.94A.570. The trial court found that petitioner had two such prior convictions and imposed the sentence required by state law.

Petitioner complains that because his sentence was based upon facts found by the trial

court by a preponderance of the evidence and not facts found by a jury beyond a reasonable doubt, his sentence violates the rules announced in the line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and including *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 542 U.S. 296 (2004). In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that *"[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. at 490 (emphasis added). While *Ring* and *Blakely*, extended and clarified *Apprendi*, neither case abandoned the exception identified in *Apprendi* permitting increased sentences based upon the fact of a prior conviction.

The Washington Court of Appeals rejected petitioner's *Apprendi* claim, holding that "[u]nder controlling precedent, Greene was not entitled to a jury determination of whether his prior convictions qualified for purposes of the POAA." (Dkt. No. 15, Ex. 7 at 21.) Petitioner identifies no clearly established federal law which requires a jury to decide the fact of a prior conviction which is relied upon by a sentencing court to increase a sentence beyond the statutory maximum. Thus, the Washington Court of Appeals decision rejecting petitioner's sentencing claim was neither contrary to, nor did it constitute an unreasonable application of, clearly established federal law. Accordingly, petitioner's federal habeas petition should be denied with respect to his final ground for relief.

CONCLUSION

Petitioner's claims challenging his convictions for indecent liberties and kidnaping and his life sentence under the POAA lack merit. This Court therefore recommends that petitioner's petition for writ of habeas corpus be denied and the action be dismissed with prejudice. A

proposed order accompanies this Report and Recommendation.

DATED this 23rd day of June, 2008.

Mary Alice Theiler
United States Magistrate Judge